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In the Supreme Court of the United States

October Term, 1981

IN THE MATTER OF THE ADOPTION OF:
JEFFREY MYLES JOFFIN

and

JENNIFER SHANNON JOFFIN

APPEAL FROM THE COURT OF APPEALS FOR
THE ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rule 12 and Rule 15 of the Rules of the Supreme Court of the United States, Appellant Bernard Joffin ("Appellant")[1], hereby submits this Jurisdictional Statement setting forth the basis of the Supreme Court's jurisdiction to review the judgment entered by the Court of Appeals for the Eleventh Appellate District, Trumbull County, Ohio ("Eleventh District").

1. In accordance with Rule 15.1(b) of the Rules of the Supreme Court of the United States, the parties to the proceeding in the Eleventh District were Appellee John Spain ("Appellee") and Appellant Dr. Bernard Joffin. The State of Ohio was not a party to the proceedings below, however, 28 U.S.C. §2403 (b) may be applicable hereto.

QUESTIONS PRESENTED

Whether O.R.C. §3107.07 Constitutes A Denial Of Equal Protection Of The Laws In Violation Of The Fourteenth Amendment Where The Standard For Termination Of A Legal Father's Parental Rights Under O.R.C. §3107.07 (A) Is Lower Than The Standard For Terminating A Putative Father's Parental Rights Under O.R.C. §3107.07(B)?

Whether O.R.C. §3107.07(A) Constitutes A Denial Of Due Process Of Law In Violation Of The Fourteenth Amendment Because It Enables The State To Terminate Parental Rights Without A Showing Of Unfitness?

Whether The Exclusion Of The Legal Parent From The Investigation Conducted By The Children's Services Bureau Pursuant To O.R.C. §3107.12 Constitutes A Denial Of The Legal Parent's Right To Due Process Of Law In Violation Of The Fourteenth Amendment?

Whether The "Best Interest" Test Of O.R.C. §3107.14 Is Unconstitutionally Vague?

TABLE OF CONTENTS

Questions Presented II
Table of Contents III
Table of Authorities IV
Opinions Below 1
Grounds of Jurisdiction of Supreme Court 1
Constitutional and Statutory Provisions Involved 2
Statement of the Case 2
Substantiality of Constitutional Questions 6
Conclusion 19

Appendix—

A. Opinion of the Eleventh District A1
B. Order of the Ohio Supreme Court A4
C. Order of the Ohio Supreme Court A5
D. Final Order of Adoption - Jeffrey Myles Spain A6
E. Final Order of Adoption - Jennifer Shannon Spain A8
F. Opinion of the Probate Court A10
G. Judgment Entry of the Eleventh District A14
H. Notice of Appeal A16
I. U.S. Constitution, Fourteenth Amendment A18
J. 28 U.S.C. §1257(2) A19
K. 28 U.S.C. §2103 ..... A20
L. O.R.C. §3107.07 ..... A21
M. O.R.C. §3107.12 ..... A23
N. O.R.C. §3107.14 ..... A25
O. O.R.C. §3107.16 ..... A27

TABLE OF AUTHORITIES

Cases

U.S. Supreme Court

Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) 1
Alsager v. Federal District Court, 406 F. Supp. 10 (D.C. Iowa 1975) 15
Glona v. American Guarantee Co., 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968) 7
Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) 15
Lassiter v. Dept. of Social Services, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) 15
Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 12
Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) 9
Santosky v. Kramer, 50 U.S.L.W. 4333 (1982) 7, 9, 11, 12
Skinner v. Oklahoma, 310 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) 7
Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) 7

State

In Re Adoption of Baker, 117 Ohio App. 26 (Cuyahoga Cty. 1962) 13
Davis v. Smith, 583 S.W.2d 37 (1979) 15

Statutes

Federal

U.S. Constitution, 14th Amendment, Section 1 .....2, 6, 8, 9, 11, 14
28 U.S.C. §1257(2) 2, 19
28 U.S.C. §2103 2

State

Ohio Revised Code §3107.07(A) 1, 2, 5, 6, 7, 8, 10, 11
Ohio Revised Code §3107.07(B) 2, 6, 7
Ohio Revised Code §3107.12 .....2, 11, 12
Ohio Revised Code §3107.14 .....2, 14, 15, 16, 18
Ohio Revised Code §3107.16 .....2, 16, 18

OPINIONS BELOW

The Opinion of the Eleventh District in *In The Adoption Of: Jeffrey Myles Joffin and Jennifer Shannon Joffin v. Dr. Bernard Joffin*, case no. 2963 is set forth as Appendix A (p. A1).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from adoption proceedings initiated by Appellee in which the Court of Common Pleas for Trumbull County, Ohio, Probate Division (hereinafter "Probate Court") granted Appellee's adoption petition. During said proceedings, Appellant, the father of the children Appellee sought to adopt, unsuccessfully challenged the constitutionality of Ohio Revised Code §3107.07(A) (hereinafter "O.R.C.") which is set forth in its entirety as Appendix L (p. A21). Appellant repeated his challenge to the constitutionality of O.R.C. §3107.07(A) on appeal to the Eleventh District which on November 23, 1981 affirmed the adoption permitted below and upheld the validity of O.R.C. §3107.07(A) (Appendix A (p. A1)). Appellant timely filed a Notice of Appeal and Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. On March 17, 1982, said court dismissed said appeal for lack of subject matter jurisdiction (Appendices B and C (pp. A4, A5)). Because Appellant challenged the validity of O.R.C. §3107.07(A) as repugnant to the Constitution of the United States and the Eleventh District[2] decided said

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2. The Eleventh District is the highest court of the State of Ohio in which a decision on Appellant's case could be had where Appellant properly invoked the jurisdiction of the Supreme Court of Ohio and said court declined to review the Eleventh District's judgment. *Abood v. Detroit Board of Education*, 431 U.S. 209, 215, 216 (1977).

question in favor of the validity of the state statute, this Supreme Court may review the Eleventh District's decision on appeal pursuant to 28 U.S.C. §1257(2)[3] (Appendix J, p. A19).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment is set forth as Appendix I, p. A18.

28 U.S.C. §1257(2) is set forth as Appendix J, p. A19.
28 U.S.C. §2103 is set forth as Appendix K, p. A20.
O.R.C. §3107.07(A) is set forth as Appendix L, p. A21.
O.R.C. §3107.07(B) is set forth as Appendix L, p. A21.
O.R.C. §3107.12 is set forth as Appendix M, p. A23.
O.R.C. §3107.14 is set forth as Appendix N, p. A25.
O.R.C. §3107.16 is set forth as Appendix O, p. A27.

STATEMENT OF THE CASE

Appellant and Susan Joffin n/k/a Susan Spain ("Mrs. Spain") were divorced on May 14, 1976, by Order of the Domestic Relations Division of the Mahoning County Common Pleas Court ("Divorce Court"). The Divorce Court awarded custody of the three (3) minor Joffin children, Jeffrey, Alison and Jennifer, to Mrs. Spain subject to the visitation rights of Appellant. Shortly after the divorce, Dr. Joffin married Judith Garcia ("Mrs. Joffin"), and Mrs. Spain married her attorney, the Appellee. In January, 1979, custody of Appellant's daughter, Alison, was transferred to him by court decree and with

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3. If this Court should find that no jurisdiction exists under 28 U.S.C. §1257(2), Appellant respectfully requests this Honorable Court pursuant to 28 U.S.C. §2103 to consider this appeal as if filed as a petition for writ of certiorari.

the consent of Mrs. Spain following continuous discord between Mrs. Spain and Alison attributable to Mrs. Spain's refusal to allow Appellant visitation with the children. Alison continues to reside with Appellant, and Jeffrey and Jennifer continue to reside with the Spains.

Following his divorce, Appellant visited his children regularly and communicated with them daily. Obstacles to visitation clearly designed to permanently separate Appellant from his children arose in April, 1978, shortly after Mrs. Spain's marriage to Appellee.

In order to avoid permanent alienation of Jeffrey and Jennifer from their father and sister, Appellant filed a Motion for Change of Custody of both Jennifer and Jeffrey in February, 1979. Pending a decision on his Motion for Change of Custody, Appellant moved for extended summer visitation in June, 1979. As a result of the Divorce Court's refusal to extend summer visitation, Appellant, frustrated with his inability to see his children, ceased paying child support after June 14, 1979. Prior to this time, Appellant an orthodontist by profession, had fully complied with the Divorce Court's support requirements, having paid a total of Twenty Thousand Eight Hundred Thirty-Two Dollars ($20,832.00) as support payment since 1976.

In response to Appellant's failure to pay child support and failure to promptly submit to a psychiatric examination, Mrs. Spain filed a Motion In Contempt Of Court, Dismissal and Sanctions wherein she requested the Divorce Court to find Appellant in contempt for failure to submit to examination, to dismiss Appellant's Motion for Change of Custody and to terminate visitation and child support. Mrs. Spain also requested that the Divorce Court order Appellant to pay delinquent support plus poundage, all guardian ad litem fees, psychiatric fees and attorney fees.

The Divorce Court granted Mrs. Spain's Motion in Contempt of Court, Dismissal and Sanctions except insofar as it requested termination of visitation and child support. As sanctions the Divorce Court ordered Appellant to pay all child support arrearages. The Court also ordered all subsequent payments impounded by the Bureau of Support. Said Order still stands. The Divorce Court further ordered Appellant to pay Three Thousand Nine Hundred Fifty Dollars ($3,950.00) in psychiatric and attorney fees to the Mahoning County Clerk of Courts and directed the Clerk to disburse that sum to the appropriate persons upon receipt.

The Divorce Court also sentenced Appellant to ten (10) days in the County Jail for failure to pay child support and three (3) days in County Jail for failure to submit to a psychiatric examination, although Appellant ultimately submitted to the examination. The Divorce Court stayed the above sentence for contempt on the condition that Appellant pay both the psychiatric and attorney's fees and all child support arrearages. When Appellant failed to make such payments, he was incarcerated on April 8, 1980.

In order to be released from jail, Appellant's attorney paid Four Thousand Dollars ($4,000.00) to the Bureau of Support. Four Thousand Dollars ($4,000.00) was the exact amount of child support owed by Appellant through April 1, 1980. As a result, Appellant believed the Four Thousand Dollars ($4,000.00) would be used to pay the child support arrearage. Although the Judgment Entry releasing him from jail required him to pay Two Hundred Fifty Dollars ($250.00) per month as child support arrearages, Appellant was not aware of the reason for said order, believing that no arrearage existed. He made said arrearage payment on May 15, 1980, as ordered, and at that time

discovered that the Four Thousand Dollars ($4,000.00) was still impounded by the Bureau as support payments. As a result, he believed all arrearages were paid and that his account was credited with excess payments.

On June 18, 1980, without notice to Appellee, Mrs. Spain orally requested the Divorce Court to disburse the Four Thousand Dollars ($4,000.00) impounded by the Bureau of Support for psychiatric and attorney's fees rather than for child support, which the Court did. The Bureau of Support disbursed said funds pursuant to this Order on July 8, 1980. Two days later, Appellee filed his Petition for Adoption alleging pursuant to O.R.C. §3107.07(A) that Appellant had failed to support his children during the previous year.

Following a hearing on both the issue of consent and the merits of the adoption, the Probate Court found that Appellant had not supported his children for at least one (1) year preceding the filing of the adoption petition and therefore his consent was not required under O.R.C. §3107.07(A). The Probate Court overruled Appellant's constitutional challenge to the statute made by Motion prior to granting Appellee's adoption petition.[4]

Appellant appealed the adoption Orders (Appendices D and E, pp. A6, A8), to the Eleventh District again raising the unconstitutionality of the statute in his Assignments of Error and Brief. The Eleventh District issued an opinion stating that Appellant's constitutional challenge was without merit and affirmed the adoption Orders (Appendix A, p. A1).

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4. The Probate Court also refused to stay proceedings while the orders of the Divorce Court were pending on appeal in the Court of Appeals for the Seventh Appellate District, Mahoning County, Ohio.

Appellant appealed to the Supreme Court of Ohio but said Court declined jurisdiction by order of March 17, 1982 (Appendices B and C, pp. A4, A5). Appellant filed his Notice of Appeal to this Court in the Eleventh District on June 8, 1982 (Appendix H, p. A16).

SUBSTANTIALITY OF CONSTITUTIONAL QUESTIONS

This appeal presents important and substantial constitutional questions as hereinafter described.

A. O.R.C. §3107.07 CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT WHERE THE STANDARD FOR TERMINATION OF A LEGAL FATHER'S PARENTAL RIGHTS UNDER O.R.C. §3107.07(A) IS LOWER THAN THE STANDARD FOR TERMINATING A PUTATIVE FATHER'S PARENTAL RIGHTS UNDER O.R.C. §3107.07(B).

Because O.R.C. §3107.07(A) merely requires the Probate Court to find that a legal father of a child sought to be adopted has failed for at least one (1) year and without justifiable cause to communicate with or support the child in order to find that the legal father's consent to the adoption is not required but O.R.C. §3107.07(B) requires the Probate Court to find that a putative father has willfully abandoned or failed to care for or support his child, Appellant and all legal fathers are denied equal protection of the laws as guaranteed by the federal and state Constitutions. Section I of the Fourteenth Amendment to the Constitution of the United States provides that no state shall deny to any person within its jurisdic-

tion the equal protection of the laws. This Court has recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment", *Santosky v. Kramer*, 50 U.S.L.W. 4333, 4335 (1982). This fundamental liberty is specifically protected by the Equal Protection Clause, *Skinner v. Oklahoma*, 310 U.S. 535 (1942). The legitimacy of a child or the status of a parent of a legitimate or illegitimate child is no longer recognized as a rational basis for application of different standards. *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968), *Stanley v. Illinois*, 405 U.S. 645 (1972). In violation of this prohibition, however, O.R.C. §3107.07 bases the standard for terminating parental rights upon the legitimacy of the child sought to be adopted. O.R.C. §3107.07(A) pertaining to legal parents provides that consent of a natural parent is not required where

> the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner, whichever occurs first.

Enumerating a higher standard for termination of parental rights of a putative father, O.R.C. §3107.07(B) provides that a putative father's consent to adoption is not required when

> . . . he has willfully abandoned or failed to care for the support of the minor . . .

Thus, O.R.C. §3107.07(B) specifically requires abandonment of or failure to support the child in question with the intent to do so, whereas O.R.C. §3107.07 does not require intent to and actual abandonment of or failure

to support the child. The impact of the different standards in the present case demonstrates the prejudice to Appellant. In the present case no doubt exists that if the $4,000.00 paid by Appellant to the Bureau of Support in order to obtain his release from jail had been credited as child support, he would have satisfied all support obligations and his parental rights would have withstood the attack based on §3107.07(A). However, unbeknownst to Appellant and contrary to his belief that he had satisfied his support obligation, the $4,000.00 was diverted for payment of court-ordered sanctions and resulted in termination of his parental rights under O.R.C. §3107.07(A). Had Appellant been held to the "willful abandonment" and "willful failure to support" standards under O.R.C. §3107.07(A), his rights could not have been terminated since he truly believed he had paid his support obligation, a fact undisputed herein, and he at no time intended or actually abandoned his son and daughter. Because no rational basis exists for imposition of different standards for termination of parental rights based on the legitimacy of the child sought to be adopted and Appellant was substantially prejudiced by the imposition of a lesser standard, he was denied equal protection of the laws in violation of the Fourteenth Amendment.

B. O.R.C. §3107.07(A) CONSTITUTES A DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT BECAUSE IT ENABLES THE STATE TO TERMINATE PARENTAL RIGHTS WITHOUT A SHOWING OF UNFITNESS.

Because O.R.C. §3107.07(A) enables the state to terminate parental rights without clear and convincing evidence of unfitness, the statute constitutes a denial of Appellant's

right to due process of law in violation of the Fourteenth Amendment.

> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-233, 32 L.Ed.2d 15, 92 S. Ct. 1526 (1972); Stanley v. Illinois, supra; Meyer v. Nebraska, 262 U.S. 390, 399-401, 67 L.Ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446 (1923). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 64 S. Ct. 438 (1944). And it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640, 39 L.Ed.2d 52, 94 S. Ct. 791, 67 Ohio Ops.2d 126 (1974).
>
> We have little doubt that the Due Process Clause would be offended '[*i*]*f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.*' Smith v. Organization of Foster Families, 431 U.S. 816, 862-863, 53 L.Ed.2d 14, 97 S. Ct. 2094 (1977) (Stewart, J., concurring in judgment). (Emphasis added.)

Quilloin v. Walcott, 434 U.S. 246, 255 (1978). See also *Santosky v. Kramer*, 50 U.S.L.W. 4333, 4337, wherein this Court held that a convincing standard is necessary in termination of parental rights proceedings. Thus, without

a showing of parental unfitness, a state's attempt to terminate a parent-child relationship violates due process. In the present case, O.R.C. §3107.07(A) does not utilize an "unfitness" standard but instead merely requires that a legal parent

> failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of petitioner, whichever occurs first.

The O.R.C. §3107.07(A) standard does not rise to the level of the "unfitness" standard. Conceivably, a parent may not, although legally obligated to do so, provide for the financial maintenance and support of his children yet be a fit parent. He may have a strong loving relationship with his children, the destruction of which could irreparably damage the emotional, mental and physical development of said children and yet for his own reasons not pay child support. Said act alone does not demonstrate unfitness. Without requiring a showing of circumstances amounting to emotional or physical abuse or neglect or outright abandonment, the "unfitness" standard is not met. Because such a showing is not required by O.R.C. §3107.07(A), it constitutes a denial of due process.

The absence of the unfitness standard in O.R.C. §3107.07(A) is illustrated by the present case. The probate court found that Appellant had failed to support his children for at least one year prior to the filing of the adoption petition by Appellee, despite the fact that during this period, Appellant had been involved in a hotly contested custody battle. All the evidence tended to show that Appellant had a close relationship with his children

until Mrs. Spain and Appellee began a concerted effort to alienate the children. Appellant made every effort to remain in contact with the children despite the Spains' efforts. Also, Appellant was awarded, with the consent of Mrs. Spain, custody of his first daughter, Alison, who today still resides with Appellant. No evidence exists that the children were unsupported or dependent upon the State. Therefore, no one could contend that Appellant emotionally or physically abused or neglected his children or abandoned them. Because Appellant cannot be and has not been proven to be an unfit father, termination of his parental rights under O.R.C. §3107.07(A) constitutes a denial of due process.

C. THE EXCLUSION OF THE LEGAL PARENT FROM THE INVESTIGATION CONDUCTED BY THE CHILDREN'S SERVICES BUREAU PURSUANT TO O.R.C. §3107.12 CONSTITUTES A DENIAL OF THE LEGAL PARENT'S RIGHT TO DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The exclusion of Appellant from the Children's Services Bureau's investigative process authorized by O.R.C. §3107.12 denied Appellant due process of law contrary to the Fourteenth Amendment. As recently stated by this Court in *Santosky v. Kramer*, 50 U.S.L.W. 4333, 4335, a state's intervention to terminate a parent-child relationship must meet the requirements of procedural due process. 50 U.S.L.W. at 4335.

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are

> strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

50 U.S.L.W. at 4335. Whether the procedures established by state courts comply with due process requirements depends on a balance of three factors enumerated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). These three factors are:

> the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

50 U.S.L.W. at 4335. In *Santosky, supra* this Court specifically noted that the private interest affected in a case involving termination of parental rights is the natural parent's right to companionship, care, custody and management of his or her children. A parent's interest in "the accuracy and justice of the decision . . . is, therefore, a commanding one." 50 U.S.L.W. at 4336.

As to the risk of error created by the state procedure this Court in *Santosky, supra* stated that it must examine the risk of error created by the procedure and the likelihood that a different procedure would reduce the risk. In the present case, under O.R.C. §3107.12, the Children's Services Bureau must conduct an investigation and file a report with the probate court which contains the following information:

(1) The physical and mental health, emotional stability, and personal integrity of the petitioner and the ability of the petitioner to provide for the needs of the minor;

(2) The physical, mental, and developmental condition of the minor to be adopted;

(3) The minor's family background, including names and identifying data regarding the biological or other legal parents;

(4) The reasons for the minor's placement with persons other than his biological or legal parents, their attitude toward the proposed adoption, and the circumstances under which the minor came to be placed in the home of the petitioner;

(5) The attitude of the minor toward the proposed adoption in any case in which the minor's age makes this feasible;

(6) The recommendation of the person or agency making the investigation as to the granting or denial of the petition for adoption.

Although the witnesses from the Children's Services Bureau testified that no notice of the investigation is given to the legal parent who normally is not included in the investigation, the Bureau will interview said parent if the parent voluntarily appears and requests an interview. The recommendation as to the ultimate issue of adoption that results from the Bureau's investigation must be accorded great weight by the probate court. *In re Adoption of Baker*, 117 Ohio App. 26 (Cuyahoga Cty. 1962). Thus the risk of loss of probative evidence is created by exclusion of the natural parent from the investigative process. The risk of such error would be reduced if Appellant were included

in the investigation. Denial of access to the investigative process to the legal parent therefore increases rather than decreases the risk of error in termination proceedings.

The state's interests in utilizing the procedure do not outweigh Appellant's commanding interest in a just decision and the decrease in risk occasioned by mandatory investigation of Appellant by the Children's Services Bureau. The only factor which would encourage excluding the Appellant from the investigative process would be the burden on the agency to notify the Appellant of the investigation and interview him. Since the Bureau's witnesses already stated that they will interview the legal parent if he or she seeks the Bureau investigator out, it would be simple enough to notify the legal parent that such an investigation is required and that the parent may be included in the investigation if he or she so desires. Because this simple procedure does not outweigh the legal parent's interest in the proceedings or the desired decreased risk of an erroneous judgment, denial of access to the investigative process violates the Fourteenth Amendment.

D. THE "BEST INTEREST" TEST OF O.R.C. §3107.14 IS UNCONSTITUTIONALLY VAGUE.

Because the "best interest" test of O.R.C. §3107.14 is so vague it provides the probate court with no legal standards for granting an adoption and forever terminates the rights of the natural parent, the statute fails to meet due process requirements.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct,

> we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms', it 'operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' (Footnotes omitted).

Grayned v. City of Rockford, 408 U.S. 104, 108, 109 (1972). As stated by this Court in *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981).

> This Court more than once has adverted to the fact that the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values.

Some state courts have declared statutes relying on the "best interest" standards unconstitutionally vague. *Davis v. Smith*, 583 S.W.2d 37 (1979); *Alsager v. Federal District Court*, 406 F. Supp. 10 (D.C. Iowa 1975).

In the present case, O.R.C. §3107.14 which provides that an adoption petition may be granted where it is in the *best interests* of the child must also be stricken as

vague.[5] The probate court's focus upon Appellant's temporary refusal to pay child support rather than factors affecting the children demonstrate the unlimited range of discretion permitted by the "best interests" test of O.R.C. §3107.14. Appellant consistently demonstrated that he loves his children. From the date of his divorce to May, 1978, Appellant visited his children regularly and communicated with them daily. In order not to allow the Spains to separate Jeffrey and Jennifer from him, his family, and their sister, Alison, Appellant sought custody of the children. He repeatedly sought visitation with Jeffrey and Jennifer when the bar to integration of the children into his present family was removed by the Divorce Court. Dr. Joffin testified at the adoption hearing that he still loves his children despite the Spains' attempts to separate them. The fact that Appellee may love the children also is not a sufficient reason for terminating their relationship with Appellant. The fact that the children are loved by two men, Appellant and Appellee, can only further their interests.

Appellant's background also demonstrates that termination of his parental rights is contrary to the welfare of the children. Appellant is only fifty (50) years of age and is in good health. He is a respected orthodontist and humanitarian. The fact that most of his patients are children demonstrates his ability to relate to children. The Appellee is eleven (11) years older than Appellant and has had severe heart problems. The probability that Appellant will live longer and therefore provide the children with love and guidance longer should have prevented this adoption.

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5. After the expiration of one year, an adoption under the Ohio Revised Code becomes final and subject to challenge only under the limited circumstances set forth in O.R.C. §3107.16 (Appendix O, p. A27).

The fact that Appellant is of the same religion as the children also demonstrates that severance of the parental relationship is disadvantageous to the children. Although the Joffin children are being raised in the Jewish faith, adoption will deny them the religious guidance upon which Appellant has insisted. He, unlike Appellee, is a member of the Jewish faith and is intimately familiar with and attentive to his religion and the educational requirements thereof.

The fact that this adoption will effectively sever Jeffrey and Jennifer from their sister, Alison, also militates against a finding that this adoption is good for them. Neither the Spains nor the children have seen Alison since custody was transferred to Dr. Joffin in January, 1979. Only Appellant is concerned about the separation of these children. Thus, this adoption will result in the severance of a sibling relationship as well as a parental one.

In light of the fact that the children, like children of other divorced parents, can only benefit from the relationship between both them and their legal father and between them and their stepfather, the only factor upon which the probate court could have relied to grant the adoption was Appellant's temporary refusal to obey the Divorce Court's orders. The adoption proceedings underlying this appeal in no way focused on the needs of the Joffin children. The entire issue during these proceedings was the custody battle before the Divorce Court and Appellant's attitude toward the judicial system. On closing arguments, counsel for Appellee did not discuss the needs of the children but instead argued only that Appellant "disregarded the authority of one of our country's most important institutions." Counsel also condemned Appellant for engaging in civil disobedience rather than submit to a system which consistently denied him access to his chil-

dren. Not only the Appellee but also the probate court focused on the events which had occurred in the Divorce Court rather than on the children. The probate court drafted a three (3) page opinion (Appendix F, p. A10) wherein it relates the Divorce Court proceedings and concludes that Appellant's "remedies were through the court and not by penalizing the children by withholding their support". The probate court wrote no opinion as to the best interests of the children.

The fact that the sole purpose of the adoption was to end all custody and visitation issues in the Divorce Court should have precluded the probate court from entering an adoption decree. Mr. Michael Harshman, former counsel for Appellant, testified that the Appellee told him the purpose of the adoption was to end the litigation. Because adoption proceedings were not meant to nor should be allowed to determine custody matters properly within the jurisdiction of the Divorce Court, and because the allowance of such an aberrated use of the system is contrary to the emotional and physical development of the children sought to be adopted, the probate court's misguided exercise of discretion pursuant to the "best interest" standard of O.R.C. §3107.14 constitutes denial of due process.

CONCLUSION

For the reasons stated herein, Appellant respectfully requests this Honorable Court to consider this matter on appeal pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals of Ohio, Eleventh District

(Filed November 23, 1981)

Case No. 2963

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF TRUMBULL

IN THE MATTER OF ADOPTION:
JEFFREY MYLES JOFFIN and
JENNIFER SHANNON JOFFIN,
Plaintiff-Appellees,

vs.

DR. BERNARD JOFFIN,
Defendant-Appellant.

OPINION

DAHLING, *J.*,

This is an appeal from a judgment of the Probate Division, Court of Common Pleas, Trumbull County, wherein the court granted the petition of John Spain to adopt Jennifer and Jeffrey Joffin. Jennifer was born May 21, 1971 and Jeffrey was born March 13, 1964.

The appellant, Bernard Joffin, is the natural father of said children and has presented the following Assignments of Error for review:

I. The Probate Court erred to the prejudice of Dr. Joffin by denying his Motion to Dismiss for Lack of Jurisdiction (January 12, T.p. 2, 3)

II. The Probate Court erred to the prejudice of Dr. Joffin by denying his Motion to Find O.R.C. 3107.07(A) Unconstitutional (January 12, T.p. 2, 3)

III. The Probate Court erred to the prejudice of Dr. Joffin by denying his Motion for Investigation of Bernard Joffin (January 12 T.p. 2, 3)

IV. The Probate Court erred by denying Dr. Joffin's Motions for Appointment of Guardian Ad Litem and Psychological Evaluation of Jeffrey and Jennifer (January 12 T.p. 2, 3).

V. The Probate Court erred to the prejudice of Dr. Joffin by finding that his consent to the adoption was not required under O.R.C. 3107.07(A) (Opinion T.d. 26).

VI. The Probate Court erred to the prejudice of Dr. Joffin by finding that the adoption of Jeffrey and Jennifer by Petitioner were in the best interests of the children and granting the Petition (Final Order of Adoption T.D. 30).

These Assignments of Error are without merit.

FIRST ASSIGNMENT OF ERROR

In this Assignment of Error, appellant argues that since the Seventh District Court of Appeals may reverse the Domestic Relations Court and give him custody that the Probate Court lacked jurisdiction. We disagree.

In re: Biddle, 168 O.S. 209 (1958), is authority that Probate Court has jurisdiction in an adoption notwithstanding the fact that custody is within the continuing

jurisdiction of a divorce court. If this were not the proper interpretation then in every adoption following a divorce, there would be the possibility of a change of custody.

SECOND ASSIGNMENT OF ERROR

We have considered appellant's tortured reasoning as to unconstitutionality and find it is without merit.

THIRD ASSIGNMENT OF ERROR

Here appellant argues that because he was not investigated, error was committed. It was not necessary to investigate the appellant to determine the desirability of the adoptive home and the suitability of John Spain as an adoptive parent.

FOURTH ASSIGNMENT OF ERROR

We have considered appellant's contention that a guardian ad litem should have been appointed and find it is without merit.

FIFTH ASSIGNMENT OF ERROR

This Assignment of Error is without merit as the evidence was clear that appellant had failed to provide support during the relevant period.

SIXTH ASSIGNMENT OF ERROR

This Assignment of Error is that the adoption was not in the best interest of the children. Since the evidence was abundant that John Spain is a suitable person to adopt, this Assignment of Error must fail.

Judgment affirmed.

/s/ ALFRED E. DAHLING
Judge

HOFSTETTER, *P.J.*,
COOK, *J.*, Concur in judgment only

APPENDIX B

Order of the Supreme Court of Ohio Overruling Motion to Certify

(Dated March 17, 1982)

No. 82-38

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

IN RE THE ADOPTION OF JEFFREY MYLES JOFFIN ET AL.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR TRUMBULL COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

APPENDIX C

Order of the Supreme Court of Ohio Dismissing the Appeal

(Dated March 17, 1982)

No. 82-38

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

IN RE THE ADOPTION OF JEFFREY MYLES JOFFIN ET AL.

APPEAL FROM THE COURT OF APPEALS FOR TRUMBULL COUNTY

This cause, here on appeal as of right from the Court of Appeals for Trumbull County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX D

Judgment Entry of the Probate Division of the Common Pleas Court re Adoption of Jeffrey Myles Spain

(Filed January 30, 1981)

JUDGMENT ENTRY

Case No. A 5750

Final Order of Adoption

In the Court of Common Pleas, Probate Division Trumbull County, Ohio No. A 5750 Doc. A 63 Page 5 Filed January 30 1981.

IN THE MATTER OF THE ADOPTION OF

Jeffrey Myles Spain

JUDGMENT ENTRY

On this 30th day of January, 1981, this cause came on to be heard on the petition of John Richard Spain.

All the necessary parties to the adoption consented or were duly served with notice of the hearing concerning this adoption.

After reviewing the entire record, hearing testimony and other evidence, the Court finds that the granting of the adoption is in the best interest of the person to be adopted.

The Court finds that the requirements of Ohio Revised Code have been fully complied with, that the petitioner

is suitably qualified to care for and rear the child, and that the best interest of the child would be served by granting this adoption.

/s/ THOMAS A. SWIFT
Probate Judge

APPENDIX E

Judgment Entry of the Probate Division of the Common Pleas Court re Adoption of Jennifer Shannon Spain

(Filed January 30, 1981)

JUDGMENT ENTRY

Case No. A 5749

Final Order of Adoption

In the Court of Common Pleas, Probate Division Trumbull County, Ohio No. A 5749 Doc. A 63 Page 4 Filed January 30, 1981

IN THE MATTER OF THE ADOPTION OF

Jennifer Shannon Spain

JUDGMENT ENTRY

On this 30th day of January, 1981, this cause came on to be heard on the petition of John Richard Spain.

All the necessary parties to the adoption consented or were duly served with notice of the hearing concerning this adoption.

After reviewing the entire record, hearing testimony and other evidence, the Court finds that the granting of the adoption is in the best interest of the person to be adopted.

The Court finds that the requirements of Ohio Revised Code have been fully complied with, that the petitioner is

suitably qualified to care for and rear the child, and that the best interest of the child would be served by granting this adoption.

/s/ THOMAS A. SWIFT
Probate Judge

APPENDIX F

Opinion of the Probate Division of the Common Pleas Court

(Filed January 21, 1981)

COURT OF COMMON PLEAS
PROBATE DIVISION
TRUMBULL COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF
JEFFREY MYLES JOFFIN
and
JENNIFER SHANNON JOFFIN

OPINION

On July 10, 1980, the petitioner, John Richard Spain, filed a petition to adopt his step-children, Jeffrey Myles Joffin and Jennifer Shannon Joffin. They are the children of his wife, Susan Carol Spain, and her former husband, Dr. Bernard Joffin. Mrs. Spain and Jeffery have each filed a consent to adopt herein.

At the request of the parties, a hearing was held on January 12, 1981, to determine whether the consent of Dr. Joffin was necessary. The petitioner alleged that such consent was not necessary since Dr. Joffin has failed without justifiable cause to maintain and support the minor children for at least one year immediately preceding the filing of his petition.

Dr. Joffin alleged that he has met his communication and support requirements. In the alternative, he alleged

that there has been justifiable cause for his failure to support the minor children.

The evidence indicated that Mrs. Spain and Dr. Joffin were divorced on May 14, 1978. The judicial decree granted custody of the minor children to Mrs. Spain and granted Dr. Joffin specific visitation rights. The decree also required Dr. Joffin to pay $200.00 per month for the support of each of the children.

Dr. Joffin exercised his visitation rights until August 1978. Early in 1978, a dispute arose between Dr. Joffin and Mrs. Spain regarding an extended visitation during the summer of 1978. Dr. Joffin was unsuccessful in extending his visitation rights through the Mahoning County Domestic Relations Court. Thereafter, numerous legal battles insued in that court.

Since August 1978, Dr. Joffin has not had a regular visitation with the children. He claimed he has had a few telephone conversations with them and has sent them some greeting cards. He also claimed to have seen the children on occasions at school and at Temple, but with limited communications. He alleged that he made three unsuccessful attempts to visit with the children during the year immediately preceding the filing of the petition.

Dr. Joffin acknowledged that he had the ability to pay child support. He stated, however, that he stopped making regular monthly payments on June 14, 1979. This was due, in part, to his unsuccessful attempt to obtain an extended summer visitation with the children. He also claimed that it was due to his inability to see the children and the fact that he was upset with the Mahoning County Domestic Relations Court.

During the year immediately preceding the filing of the petition, two payments were made to the Mahoning

County Bureau of Support. The first was for $4,000.00 and was made on April 10, 1980. The second was for $650.00 and was made on May 15, 1980. Dr. Joffin claimed that these payments were for child support. The petitioner alleged that the first payment was for expenses ordered by the domestic relations court during a contempt proceeding. He also alleged that the second was either in whole or in part for child support arrearages.

The evidence indicated that the domestic relations court ordered Dr. Joffin to pay certain expenses totaling $3,950.00 and support arrearages. This order was confirmed by the Seventh District Court of Appeals. Dr. Joffin was sent to jail when he failed to make these payments. He was released from jail after paying $4,000.00 to the Bureau of Support.

It was apparent that the domestic relations court intended for the expenses to be paid before any credit was given for support arrearages. In fact, the court impounded the money and the expenses were paid as required by the court. The result was that neither Mrs. Spain nor the minor children received any cash from this payment. Therefore, it cannot and should not be credited to Dr. Joffin as child support.

The only other payment in the year immediately preceding the filing of the petition was made on May 15, 1980 and was for $650.00. It was argued that $400.00 was credited to child support and $250.00 was credited toward support arrearages. Even so, this payment cannot be construed as substantial compliance with the judicial decree of the domestic relations court.

It is therefore the opinion of this court that Dr. Joffin has failed to provide for the maintenance and support of the minor children as required by the judicial decree

for at least one year immediately preceding the filing of the adoption petition. It is also the opinion of this court that such failure was without justifiable cause.

Dr. Joffin testified that he was upset when he did not obtain an extended summer visitation with the children, that he was upset with the domestic relations court and that he was upset when he was denied visitations on certain occasions. His remedies were through the court and not by penalizing the children by withholding their support.

Therefore, it is the opinion of this court that R.C. 3107.07(A) is applicable and that the consent of Dr. Joffin is not required for this matter to proceed on the adoption petition.

/s/ THOMAS A. SWIFT
Judge

APPENDIX G

Judgment Entry of the Court of Appeals of Ohio, Eleventh District

(Filed November 23, 1981)

Case No. 2963

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL)

IN THE MATTER OF ADOPTION OF:
JEFFREY MYLES AND JENNIFER JOFFIN
Appellee

vs.

DR. BERNARD JOFFIN
Appellant

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ALFRED E. DAHLING
Judge for the Court

HOFSTETTER, *P.J.*,
COOK, *J.*, Concur in
judgment only

APPENDIX H

Notice of Appeal to the Supreme Court of the United States

(Filed in the Court of Appeals June 8, 1982)

Case No. 2963

IN THE COURT OF APPEALS
FOR THE ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF:
JEFFREY MYLES JOFFIN

and

JENNIFER SHANNON JOFFIN

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bernard Joffin, Appellant herein, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Court of Appeals for the Eleventh Appellate District, Trumbull County, Ohio entered in this action on November 23, 1981 following the Supreme Court of Ohio's Order of March 17, 1982 declining jurisdiction in this matter.

This appeal is taken pursuant to Title 28, United States Code, Section 1257 (2).

Respectfully submitted,

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Attorneys for Appellant

SERVICE

A copy of the foregoing Notice Of Appeal To The Supreme Court Of The United States was served upon CHARLES RICHARDS, Second National Bank Tower, Warren, Ohio, 44481; by regular U.S. Mail on this 7th day of June, 1982.

/s/ WILLIAM T. WULIGER
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Attorneys for Appellant

APPENDIX I

United States Constitution, Amendment XIV,

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX K

28 U.S.C. § 2103

§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

APPENDIX L

Ohio Revised Code § 3107.07

3107.07 Consents not required

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner, whichever occurs first.

(B) The putative father of a minor if the putative father fails to file an objection with the court, the department of public welfare, or the agency having custody of the minor as provided in division (F)(3) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first;

(C) A parent who has relinquished his right to consent under section 5103.15 of the Revised Code;

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code;

(E) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(F) Any legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent for a period of thirty days or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(G) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain the consent or refusal of the spouse;

(H) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to Sec. 101(b)(1)(F) of the "Immigration and Nationality Act," 75 Stat. 650 (1961), 8 U.S.C., 1101 (b)(1)(F), as amended or reenacted.

APPENDIX M

Ohio Revised Code § 3107.12

3107.12 Investigation; report; costs

(A) An investigation shall be made by the department of public welfare, an agency, or other person appointed by the court to inquire into the conditions and antecedents of a person sought to be adopted and of the petitioner, for the purpose of ascertaining whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor. If the minor sought to be adopted is in the custody of the department or an agency, then the department or agency shall perform the investigation.

(B) A written report of the investigation shall be filed with the court at least ten days before the petition is heard.

(C) The report of the investigation shall contain the following information in addition to any other information the court requires regarding the petitioner or the minor to be adopted:

(1) The physical and mental health, emotional stability, and personal integrity of the petitioner and the ability of the petitioner to provide for the needs of the minor;

(2) The physical, mental, and developmental condition of the minor to be adopted;

(3) The minor's family background, including names and identifying data regarding the biological or other legal parents;

(4) The reasons for the minor's placement with persons other than his biological or other legal parents, their attitude toward the proposed adoption, and the circumstances under which the minor came to be placed in the home of the petitioner;

(5) The attitude of the minor toward the proposed adoption in any case in which the minor's age makes this feasible;

(6) The recommendation of the person or agency making the investigation as to the granting or denial of the petition for adoption.

(D) The department of public welfare or the agency or person designated by the court to make the required investigation may request other departments or agencies within or outside this state to make or assist in the investigation as may be appropriate and to make a written report of the investigation, which shall be included with and attached to the report to the court, and shall make similar investigations and reports on behalf of other agencies or persons designated by the courts of this state or another place.

(E) Upon order of the court, the costs of the investigation and other proceedings shall be paid by the petitioner, and if the investigation is conducted by a public agency or public employee, the part of the cost representing any services and expenses shall be taxed as costs and paid into the state treasury or county treasury, as the court may direct.

APPENDIX N

Ohio Revised Code § 3107.14

3107.14 Court's discretion; final decree or interlocutory order

(A) The petitioner and the person to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

(B) The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition and may examine the petitioners separate and apart from each other.

(C) If at the conclusion of the hearing the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person to be adopted, it may issue a final decree of adoption or issue an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months nor more than one year from the date of issuance of the order, unless sooner vacated by the court for good cause shown.

In an interlocutory order of adoption, the court shall provide for observation, investigation, and a further report on the adoptive home during the interlocutory period.

(D) If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court

shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner, if the court finds it is in the best interest of the person, or if the person is a minor, the court may certify the case to the juvenile court of the county where the minor is then residing for appropriate action and disposition.

APPENDIX O

Ohio Revised Code § 3107.16

3107.16 Appeals; finality of decree

(A) Appeals from the probate court are subject to the Rules of Appellate Procedure.

(B) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or in the case of the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse, or in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

Office - Supreme Court, U.S.
FILED
AUG 30
ALEXANDER L. STEVAS,
CLERK

NO. 81-2352

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1981

IN THE MATTER OF THE ADOPTION OF:
JEFFREY MYLES JOFFIN
AND
JENNIFER SHANNON JOFFIN

Appeal From the Court of Appeals
For the Eleventh Appellate District
Trumbull County, Ohio

MOTION TO DISMISS

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I

NO. 81-2352

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1981

IN THE MATTER OF THE ADOPTION OF:
JEFFREY MYLES JOFFIN
AND
JENNIFER SHANNON JOFFIN

Appeal From the Court of Appeals
For The Eleventh Appellate
District, Trumbull County, Ohio

MOTION TO DISMISS

Now comes the appellee and moves this Honorable Court to dismiss this appeal for the following reasons:

1. This appeal does not present a substantial Federal question worthy of review by this Court.

2. Appellant was in no way prejudiced by the application of Ohio adoption procedure, and substantial justice has been done, since the adoption of the children by Appellee was warranted by the evidence under the test most favorable to Appellant.

TABLE OF CONTENTS

TABLE OF CONTENTS II

QUESTIONS PRESENTED III

TABLE OF AUTHORITIES IV

STATEMENT OF THE CASE 1

ARGUMENT 5

CONCLUSION 7

PROOF OF SERVICE 8

III

QUESTIONS PRESENTED

1. Does the Ohio procedure for adoption by a step-father of his wife's children, without the natural father's consent, which procedure requires that the Trial Court find (1) that the natural father has failed without justifiable cause to provide for the maintenance and support of the minor children as required by judicial decree for at least one year immediately preceding the filing of the adoption petition and (2) that the adoption is in the best interests of the children, meet minimum requirements for due process of law, even though the adoption procedure does not require an express finding that the natural father is unfit?

2. Does the Ohio adoption procedure, which provides standards for adoption of children of a natural father different from the standards for adoption of the children of a putative father violate equal protection of the laws and if it does, was the Appellant prejudiced by the application of the procedure to him?

TABLE OF AUTHORITIES

CASES

U. S. SUPREME COURT

Matthews, Secretary of H.E.W. v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S. Ct. 893 5
Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549 5

STATUTES

STATE

Ohio Revised Code 3107.07 (A) 5
Ohio Revised Code 3107.07 (B) 5

STATEMENT OF THE CASE

On July 10, 1980, Appellee, John R. Spain, filed petitions in the Probate Court of Trumbull County, Ohio, seeking to adopt his wife's children, Jeffrey and Jennifer Joffin. The matter was set for hearing on January 12, 1981, and a trial lasting several days ensued, during which Appellant was represented by two attorneys and after which the Probate Court found that Appellant had failed to support his children without justifiable cause for the one year period immediately preceding the filing of the petitions for adoption and that as a result, Appellant Joffin's consent to the adoptions was not required. A second evidentiary hearing was held after which the Trial Court also found that the adoptions were in the best interests of the children and ordered the adoptions. On January 30, 1981, certificates of adoption were issued as to each child.

Appellant filed a notice of appeal in the Ohio Eleventh District Court of Appeals on February 3, 1981, appealing the order of adoption as to each child. The Eleventh District Court of Appeals affirmed the judgment of the Trial Court on November 23, 1981. Appellant then appealed to the Supreme Court of Ohio (Case No. 82-38) and on March 17, 1982, the Supreme Court of Ohio refused to accept the case for review.

Appellant Joffin and Susan Spain were married on February 5, 1961, and divorced in Mahoning County, Ohio, on May 14, 1976. Appellee, John R. Spain, married Susan Spain on February 14, 1978, and Jeffrey and Jennifer Joffin, the children who are the subject matter of this litigation, were placed in Mr. Spain's home on that date.

Appellee sought to adopt his two step-children, Jeffrey and Jennifer. Jeffrey consented to the adoption in the Probate Court of Trumbull County, Ohio, being of appropriate age to do so and the children's mother, Susan Spain, also consented to each adoption.

The decree of divorce which terminated the marriage of Appellant and Susan Spain ordered Appellant to pay child support of $200 per month per child, a total support obligation for Jeffrey and Jennifer of $400 per month.

The divorce case between Appellant and his former wife became a battleground over child custody and visitation, a situation which continued to exist after Appellee and Mrs. Spain were married. On February 20, 1979, Appellant filed a motion seeking custody of Jeffrey and Jennifer. As a result of that motion, a Youngstown, Ohio, attorney was appointed guardian ad litem for the children and the Domestic Relations Judge ordered evaluations by a psychiatrist of all parties involved. Both children were to be evaluated as were Dr. Joffin, Attorney and Mrs. Spain and Dr. Joffin's second wife.

Appellant Joffin refused to submit to the psychiatric examinations and accordingly was found in contempt of court by journal entry dated February 22, 1980. On that day, Appellant was also found in contempt of court for failure to pay child support and was sentenced to jail on each separate contempt finding. The sentence was ten days on the failure to pay support and three days for failing to submit to the psychiatric examination.

Appellant was also ordered to pay $3,950 in fees and expenses relative to the psychiatric examinations and his failure to submit to such an examination. By this time, Appellant was at least $3,600 behind in child support.

Appellant was given a chance to purge himself of the contempt citation, but refused to do so. On April 8, 1980, the Domestic Relations Judge ordered Appellant's previous jail sentence of February 22, 1980, into effect and Appellant Joffin was incarcerated in the Mahoning County, Ohio, jail on Tuesday, April 8, 1980. He remained in jail for two days until his release on April 10, 1980.

On April 10, 1980, Dr. Joffin paid $4,000 to gain his release from jail. The money was immediately impounded by the Domestic Relations Judge in a written entry which stated that all allocations of the $4,000 would be made "at a later time".

The order of April 10, 1980, releasing the Appellant from jail made it clear that an arrearage on child support still existed. The judgment entry said,

> "2. Defendant, Bernard Joffin, is hereby ordered to pay the sum of Two Hundred Fifty Dollars ($250) per month on arrearages owed by him per previous orders of this Court, until said arrearages are paid in full..."

Appellant's total monthly obligation therefore became $650 ($400 + $250) until the arrearage was paid. Appellant made one payment of $650 on May 15, 1980, and has made no further child support payments whatsoever since that date.

On June 18, 1980, the bureau of support was ordered by the Domestic Judge to disburse the $4,000 which had been paid by Joffin on April 10, 1980. Disbursements were ordered to Attorney Thomas Infante, the guardian ad litem, and to Dr. Giannini and Attorney Eugene Fox, who received $700 for attorney fees for time spent trying to get Appellant to undergo a psychological examination and then finding him in contempt of court for refusing to do so. There was no evidence in the record of the trial that Appellee Spain or his wife had anything to do with the disbursal of the funds paid into Court on April 10, 1980. Mrs. Spain, the children's mother, got no part of the $4,000.

The relevant period in the adoption proceedings was the period from July 10, 1979, to July 10, 1980. The Appellant's obligation of child support for that twelve month period was $4,800. The total child support paid by Appellant during that period was $650. Appellant argued in the Trial Court that the $4,000 which he paid on April 10, 1980, which was used to satisfy the contempt order and pay the fines and expenses, was really a payment by him against his child support obligation. Dr. Joffin, however, knew of the language in the April 10, 1980, order impounding the funds and finding an arrearage, and had already acknowledged the same by making one increased payment of $650 on May 15, 1980. Also, Joffin received written notice from the bureau of support on June 30, 1980, that he had a child support arrearage of almost $4,600.

The Trial Court found that the payment of $4,000 on April 10, 1980, was not a support payment and that Dr. Joffin had paid only $650 of his $4,800 obligation during the relevant

period; that he did not have justifiable cause for his failure to support and ordered the adoption of each child without his consent.

Appellant Joffin filed a motion for summary judgment in the Trial Court accompanied by his sworn affidavit, Item 12 of which stated:

> "I only stopped making regular monthly support payments in June, 1979, due to the fact that I was unsuccessful in obtaining visitation with my children."

Appellant therefore admitted that his child support payments had stopped 13 months before the petitions for adoption were filed.

ARGUMENT

A state procedure for the adoption of a child by a step-father without the consent of the natural father meets minimal procedural due process of law requirements when it provides or requires:

A. Notice of the proposed adoption to the natural father;

B. Consent to the adoption by the natural mother;

C. A full evidentiary hearing on all issues involved;

D. A finding by the Trial Court that the natural father has failed to support the children without justifiable cause for the one year period immediately preceding the filing of the petition for adoption by the step-father;

E. A finding by the Trial Court that the adoption is in the best interests of the children. Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549; Matthews, Secretary of H.E.W. v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893.

This Court has already decided that the "best interests of the child" test meets minimum requirements for procedural due process of law in an adoption case, Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549.

Appellant Dr. Joffin could not, in any way, have been prejudiced by the alleged dual standard contained in the Ohio procedure as set forth in R.C. 3107.07 (A) and R.C. 3107.07 (B). At the outset it should be noted that the Appellant's argument in this connection as to a denial of equal protection of the laws was called "tortured reasoning" by the Ohio Appellate Court and with good reason. Appellant has completely misconstrued O.R.C. 3107.07. Actually, it is more difficult for one to adopt the child of a natural parent than it is the child of a putative parent under the Ohio procedure. It is readily apparent that in each case the standard is the same, that is, failure to support; but that in the case of the putative father, there is no one year requirement as exists in the case of the natural parent. Thus, the child of a putative father could be adopted away from

him on a showing of willful failure to support for a period of time shorter than one year while at least one year is required in the case of a child of a natural parent.

In any event, the Appellant could not have been prejudiced because the evidence supported a finding that Appellant willfully failed to support his children for the relevant period, such that the standard most favorable to Appellant Dr. Joffin and under which it was most difficult for the step-father to adopt Dr. Joffin's children was applied. The affidavit filed in the Trial Court by Dr. Joffin showed that he intentionally stopped paying support for his children. Most important of all is the fact that before the petitions for adoption were filed, Dr. Joffin was given notice that he was over $4,000 in arrears in his child support obligation. Thus, the claim on Page 8 of Appellant's brief that:

> "...he truly believed he had paid his support obligation, a fact undisputed herein,..."

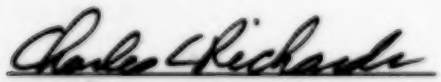
is absolutely false. The failure to pay support in the face of a direct notice from the Bureau of Support could be construed as nothing less than the willful failure to support by the Appellant, thereby allowing the adoptions under the more difficult standard and making any unequal protection argument inapplicable.

The exclusion of the Appellant from the preadoption investigation by the state agency could not in any way have prejudiced Appellant, since a full evidentiary hearing was had at which time Appellant testified at length and all facts which the investigation would have revealed were made known to the Trial Court by Appellant or could have been made known to the Trial Court by him.

CONCLUSION

There are no substantial Federal questions involved in this appeal and the Appellant was in no way prejudiced by the application of the Ohio adoption procedure to him. The appeal should be dismissed.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned, Charles L. Richards, a member of the Bar of the Supreme Court of the United States of America, hereby certifies that on August 9, 1982, a true and exact copy of the motion to dismiss filed on behalf of Appellee was deposited in the United States mail, postage prepaid, and addressed to counsel for Appellant.

Charles L. Richards

CHARLES L. RICHARDS